Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996	)	
	)	CC Docket No. 94-129
Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	)	

FURTHER NOTICE OF PROPOSED RULE MAKING AND MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: July 14, 1997 Released: July 15, 1997

Comment Date: [30 days from Federal Register Publication]
Reply Comment Date: [45 days from Federal Register Publication]

By the Commission:

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I. INTRODUCTION

1. In the Further Notice of Proposed Rule Making portion of this Order, we expand the above-captioned docket to seek comment on proposed modifications to our rules in order to implement Section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996.[1] The Act makes it unlawful for any telecommunications carrier to submit or execute a change in a subscriber's carrier selection except in accordance with the Commission's verification procedures, and provides that any carrier that violates these procedures and collects charges for telecommunications service from a subscriber after such violation shall be liable to the subscriber's properly authorized carrier for all charges collected. In the Further Notice we seek comment on our tentative conclusion that the consumer protection and competitive goals and policies underlying our *1995 Report and Order*[2] apply with equal force to all telecommunications carriers within the meaning of the Act. We specifically seek comment on the applicability of our verification rules contained in Sections 64.1100 and 64.1150[3] to all telecommunications carriers, and whether these rules should apply when carriers solicit subscribers regarding preferred carrier freezes.[4] In response to comments received in petitions for reconsideration of our *1995 Report and Order*, we also seek comment on whether the "welcome package" described in Section 64.1100(d) continues to be a viable and necessary carrier change verification alternative, and invite commenters to consider any benefits derived by consumers from this option. We also invite commenters to quantify the costs and benefits associated with in-bound verification to support the contention that in-bound calls should be exempt from the Commission's verification rules. In addition, we seek comment regarding subscriber-to-carrier liability,[5] carrier-to-carrier liability, and carrier-to-subscriber liability in light of the Act's new provisions. Finally, we ask for comment on whether to establish a "bright-line" evidentiary standard for determining whether a subscriber has relied on a resale carrier's identity of its underlying facilities-based network provider, hence requiring that the resale carrier notify the subscriber if the underlying network provider is changed.

2. In the Memorandum Opinion and Order on Reconsideration, we dispose of six petitions for reconsideration[6] of our *1995 Report and Order*, and amend our rules in three respects. First, we

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[1] 47 U.S.C. § 258. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (Act). The principal goal of the Act is to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." *See* Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996) (Joint Explanatory Statement).

[2] Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket No. 94-129, Report and Order, 10 FCC Rcd 9560 (1995) (*1995 Report and Order*).

[3] 47 C.F.R.§§ 64.1100, 64.1150. We are proposing to expand our verification rules to also include Sections 64.1160 and 64.1170. *See* Appendix C.

[4] A preferred carrier freeze (PC freeze), also called a block, prevents a carrier change unless the subscriber gives the carrier from whom the freeze was requested his or her express written or oral consent.

[5] That is, we seek comment regarding whether slammed consumers should be liable for charges assessed by an unauthorized carrier.

[6] Parties filing petitions for reconsideration and responsive pleadings are listed at Appendix A.

modify Section 64.1150(g) to clarify that IXCs using letters of agency (LOAs)[7] must fully translate their LOAs into the same language(s) as their associated promotional materials or oral descriptions and instructions. Second, we modify Section 64.1150(e)(4) to incorporate the terms interLATA and intraLATA,[8] as well as interstate and intrastate, in order to remove possible confusion or uncertainty about the scope of our rules, which are generally relevant to all jurisdictions. Third, we modify Section 64.1100(a) to clarify that carriers must confirm orders for long distance service generated by telemarketing using only one of the four verification options. Aside from these modifications and seeking further comment in the Further Notice of Proposed Rule Making as noted above, we otherwise decline to adopt the positions urged by petitioners.

II. BACKGROUND

3. Section 258 of the Act makes it unlawful for any telecommunications carrier[9] to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe."[10] The section further provides that:

> [a]ny telecommunications carrier that violates the verification procedures described in subsection (a) and that collects charges for telephone exchange service or telephone toll service from a subscriber shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation.[11]

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[7] Traditionally, an LOA has been defined as "a document, signed by the customer, which states that a particular carrier has been selected as that customer's 'primary interexchange carrier.'" *1995 Report and Order*, 10 FCC Rcd at 9560. Under the rules we propose herein, an LOA could also indicate that a particular carrier has been selected as the preferred carrier for other telecommunications services, such as local exchange.

[8] The term "LATA," or local access and transport area, is generally defined as a contiguous geographic area established by a Bell operating company such that no exchange area includes points within more than one metropolitan statistical area or State. *See* 47 U.S.C. § 153(25). The Act defines "interLATA service" as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21). IntraLATA service is telecommunications between two points located within the same local access and transport area.

[9] The Act defines "telecommunications carrier" in pertinent part as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)." 47 U.S.C. § 153(44). "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). The Act also defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[10] 47 U.S.C. § 258(a).

[11] 47 U.S.C. § 258(b).

4. A subscriber may authorize a change of his or her telecommunications carrier by requesting the change directly from his or her local exchange carrier (LEC), or by authorizing the new carrier to request a change on his or her behalf in response to a written or telemarketing[12] solicitation, or an advertisement.[13] Section 258 reflects Congressional recognition that unauthorized changes in subscriber's carrier selections, a practice commonly known as "slamming," is a significant consumer problem.[14] Slamming has become prevalent because of developments in technology and telecommunications economics. Developments in technology enable carriers to make a large number of primary interexchange carrier (PIC) changes from one carrier's network to another with relative ease.[15] In addition, available automatic numbering identification (ANI) technology enables carriers to identify the telephone number associated with in-bound calling consumers. Carriers can then access other databases and map the ANI with other information such as social security numbers,[16] allowing them to gain access to the data necessary to make unauthorized changes. Carriers have an economic incentive to slam because they have high fixed costs for network equipment and low marginal costs for providing service to additional consumers. Thus, providing service to additional consumers, even without authorization, adds to a carrier's cash flow with little additional cost.[17] Moreover, carriers may provide service to slammed consumers for a considerable time before the consumers become aware of the unauthorized PIC change.[18] Hence, slamming distorts telecommunications markets by enabling companies engaged in misleading practices to increase their customer bases, revenues and profitability through illegal means.[19]

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[12] Telemarketing solicitations may be in-bound (*i.e.*, consumer-initiated), or out-bound.

[13] For example, subscribers may contact either the incumbent LEC or the new LEC to change their local exchange service.

[14] Joint Explanatory Statement at 1. The 1996 Act does not define slamming, but the Joint Explanatory Statement states that the conference agreement adopted the House provision, which refers to slamming as "illegal changes in subscriber selections." Joint Explanatory Statement at 136. Prior to the Act, the Commission defined slamming as the unauthorized conversion of a consumer's interexchange carrier (IXC) by another IXC, an interexchange resale carrier, or a subcontractor telemarketer. Cherry Communications, Inc., Consent Decree, 9 FCC Rcd 2086, 2087 (1994).

[15] For example, in its petition, the National Association of Attorneys General (NAAG) describes allegations by the states that Sonic Communications, Inc. (SCI) "just switched the long distance service of those whose names and telephone numbers it obtained from a data source." NAAG Petition at 4 (referring to SCI's submission of changes electronically). States claim that, after switching 300,000 consumers, SCI collected approximately $13 million. *Id.*

[16] *See, e.g.*, Letter from Thomas N. Maze, International Network Communications to John Muleta, FCC (Aug. 13, 1996).

[17] *See, e.g.*, "*Slamming Scourge: Stealing of Customers Spreads With Resellers of Telephone Service*," Gautam Naik, The Wall Street Journal (Jul. 26, 1995).

[18] Many consumers are not aware of an unauthorized PIC change for at least one billing cycle. *See 1995 Report and Order*, 10 FCC Rcd at 9580.

[19] Revenues are increased by carrying the traffic of the consumers who have been switched, and profitability is increased because these revenues exceed the incremental cost of serving the consumer.

5. The Commission established safeguards to deter slamming when equal access was implemented in 1985.[20] The Commission's original safeguards against slamming recognized the need for flexibility as carriers moved from a monopoly to a competitive market for long distance interexchange services. Additional safeguards to deter slamming were needed, however, as the interexchange market became more competitive due to an increase in the number of interexchange carriers (IXCs) providing service. In 1992, in response to a petition by AT&T and MCI, the Commission adopted procedures for verification of out-bound (*i.e.*, carrier-initiated) telemarketing sales of long distance services.[21] That Order required IXCs to implement one of four procedures to verify PIC-change orders for long distance service generated by telemarketing.[22] In 1994, the Commission on its own motion and in response to continuing complaints from consumers regarding slamming by IXCs, instituted a rule making and adopted rules establishing further anti-slamming safeguards to deter misleading LOAs.[23]

6. With the enactment of Section 258, we again need to reexamine our rules. Today, there are over 500 firms providing long distance service and offering a wide variety of prices and support services to consumers.[24] This increase in the number of IXCs providing service, coupled with technological advances in telecommunications markets have created opportunities for unscrupulous carriers or their marketing agents to use deceptive practices to convert large numbers of consumers to their service

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[20] *Allocation Order*, 101 FCC 2d 911 (1985), *recon. denied*, 102 FCC 2d 503 (1985); Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 935 (1985) (*Waiver Order*).

[21] *See generally* American Telephone and Telegraph Company, Petition for Rule Making, CC Docket No. 91-64, Notice of Proposed Rule Making, 6 FCC Rcd 1689 (1991) (*PIC Change NPRM*); Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, Report and Order, 7 FCC Rcd 1038 (1992) (*PIC Verification Order*), *recon. denied*, 8 FCC Rcd 3215 (1993) (*PIC Verification Reconsideration Order*).

[22] The four alternatives are: (1) obtain an LOA from the subscriber; (2) receive confirmation from the subscriber via a toll-free number provided exclusively for the purpose of confirming change orders electronically; (3) use an independent third party to verify the subscriber's order; or, (4) send an information package that includes a postpaid postcard which the subscriber can use to deny, cancel, or confirm a service order, and wait 14 days after mailing the packet before submitting the PIC change order. *PIC Verification Order*, 7 FCC Rcd at 1039; *PIC Verification Reconsideration Order*, 8 FCC Rcd at 3215-16.

[23] *See generally* Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Notice of Proposed Rule Making, 9 FCC Rcd 6885 (1994) (*NPRM*); *1995 Report and Order*, 10 FCC Rcd 9560.

[24] *See* Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 1 (Number of Carriers Reporting by Type of Carrier and 'Type of Revenue) (Dec. 1996). Table 1 indicates that 445 entities identified themselves as providers of long distance, or toll service; such entites include IXCs, Operator Service Providers (OSPs), Toll Resellers, and "Other" Toll Carriers. Our estimate of over 500 long distance service providers takes into account that some providers of long distance service did not submit information for this report, and that some entities not identified as toll carriers also provide long distance service.

to reap economic benefits. The Commission received 11,278 slamming complaints in 1995,[25] a six-fold increase over the number of such complaints received in 1993. The number of slamming complaints received in 1996 is over 16,000.[26]

7. The 1996 Act is intended to encourage competition in the local exchange area and further enhance competition in the long distance market. As a result of competition, consumers will have the ability to choose one or several carriers to provide all of their telecommunications services.[27] Competition will also fundamentally change the role of the LECs, which traditionally have been viewed as neutral third parties charged with implementing a subscriber's preferred long distance carrier choice in accordance with our equal access rules. Not only will LECs become competitors in the long distance business, IXCs and other carriers will compete with LECs to provide of local exchange service. Under the 1996 Act, the slamming rules apply to all telecommunications carriers; thus, we must assess whether existing safeguards against slamming[28] are adequate in a marketplace in which carriers can compete for local as well as long distance service customers, and where there may no longer be an independent third party executing changes in subscribers' telecommunications carriers.

III. FURTHER NOTICE OF PROPOSED RULE MAKING

8. Our continuing efforts to deter and punish slamming by IXCs reflect the serious impact of slamming on consumers. Slammed consumers are unable to use their preferred long distance service, may be overcharged, cannot use calling cards in emergencies or while travelling, and lose premiums provided by their properly authorized carrier.[29] Consumers continue to complain to the Commission that their accounts are "pirated" or "hi-jacked" through slamming and that they are "abused, cheated, and

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[25] Internal Audit, Enforcement Division, Common Carrier Bureau. NAAG, representing the attorneys general of twenty-three states, indicates in its petition that states have continued to devote "increasing resources to stop the misleading, deceptive, and fraudulent practices and the outright theft perpetrated by slammers." NAAG Petition at 3.

[26] Internal Audit, Enforcement Division, Common Carrier Bureau. The Commission has recently taken a number of enforcement actions against IXCs for slamming. *See, e.g.*, Heartline Communications, Inc., 11 FCC Rcd 18487 (1996) (Notice of Apparent Liability); MCI Telecommunications Corporation, 11 FCC Rcd 12630 (Com. Car. Bur. 1996) (Consent Decree); Excel Telecommunications, Inc., 10 FCC Rcd 10880 (Com. Car. Bur. 1995) (Forfeiture Order).

[27] *See, e.g.*, Letter from H. Richard Juhnke, Sprint general attorney, to John B. Muleta, FCC (Nov. 7, 1995).

[28] The Commission's current rules and orders require that IXCs either obtain a signed LOA from the consumer, or, in the case of telemarketing solicitations, complete one of four telemarketing verification procedures before submitting PIC-change requests to LECs on behalf of consumers. *See* 47 C.F.R. §§ 64.1100, 64.1150.

[29] *See, e.g.*, Letter from Mary T. Rossello to FCC (Mar. 4, 1996); Letter from Jian Zhao to AT&T (Dec. 4, 1995); Letter from Joy Kaston to FCC (Mar. 5, 1996); Letter from Frank Barbarino to FCC (Dec. 5, 1995). "Premiums" are additional products or services offered to customers for subscribing to a carrier's telecommunications service. *See* discussion at para. 30, *infra*.

irreversibly exploited" by the offending carriers.[30] Some consumers have complained that slamming practices of certain IXCs are "fraudulent," "deceitful," "illegal," and "an invasion of privacy."[31] The numerous complaints filed with the Commission[32] reflect that consumers that have been slammed are incensed at the loss of control over their choice of telecommunications carriers.

9. Until now, our efforts to deter slamming have been concentrated on enhancing the verification of PIC changes. Through Section 258, Congress has substantially bolstered our continuing efforts to deter, punish and, ultimately, eliminate slamming. Section 258 has added an economic disincentive for carriers to slam because it requires an unauthorized carrier that violates our verification procedures to pay the charges it collects from a slammed consumer to the properly authorized carrier.[33] Carriers that violate our verification procedures will be required to forfeit revenues they have heretofore been able to keep.[34] Our verification procedures, coupled with the economic disincentives embodied in Section 258 and the rules that we propose today, will provide a two-pronged approach to deter slamming.[35] We tentatively conclude that our current rules, with the additions and modifications described below, will best implement the statutory prohibition against slamming by any telecommunications carrier, protect the right of consumers to be free of deceptive and misleading marketing practices, and help promote full and fair competition among telecommunications carriers in the marketplace by ensuring that consumers' choices are honored.

10. The verification procedures discussed herein are also important for ensuring that unauthorized access to a consumer's proprietary network information (CPNI)[36] is not obtained through slamming. Carriers that slam consumers may be able to obtain access to the CPNI of those consumers, while they would not have been able to absent the slamming. In Section 222 of the Act, Congress recognized the consumer's privacy interests in CPNI, and limited carriers' ability to use, disclose or permit

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[30] *See* Letter from Joy Kaston to FCC (Mar. 5, 1996); Letter from Lisa and George A. Kenney to Frank Panarisi, AT&T (May 9, 1996).

[31] Letter from Joe N. Eto, Soil and Environmental Testing Service, Inc., to FCC (Nov. 11, 1995); Letter from Mary T. Rossello to FCC (Mar. 4, 1996); Letter from Mathew F. Sipowicz to FCC (Dec. 1, 1995).

[32] *See supra* para. 6.

[33] 47 U.S.C. § 258(b).

[34] Under the Commission's current policy, a carrier that has slammed a consumer is permitted to collect from the consumer the amount that the consumer's properly authorized carrier would have charged. *See 1995 Report and Order*, 10 FCC Rcd at 9579.

[35] Section 258(a) also provides that it does not preclude states from enforcing "such procedures with respect to intrastate services." 47 U.S.C. § 258(a).

[36] Section 222(f)(1) defines CPNI as "information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship." 47 U.S.C. § 222(f)(1)(A). *See* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Notice of Proposed Rule Making, 11 FCC Rcd 12513 (1996) (*CPNI NPRM*).

access to CPNI.[37] The verification procedures proposed in this proceeding give effect to the statutory prohibition against slamming and in so doing, will have the secondary effect of also protecting consumers from unauthorized access to CPNI.

A. Section 258(a) (Prohibition)

Application of the Verification Rules to All Telecommunications Carriers

11. The PIC-change verification procedures set forth in our current rules were specifically developed to address slamming and associated deceptive and misleading marketing practices by IXCs in the interexchange marketplace.[38] We emphasized in our *1995 Report and Order* that for any competitive market to work efficiently, consumers must have information about their possible market choices and the opportunity to make choices about the products and services they buy.[39] We determined that slamming takes away those choices from consumers and distorts the long distance competitive market because it rewards companies that engage in deceptive and misleading practices by unfairly increasing their customer base at the expense of those companies that market in a fair and informative manner.[40] The 1996 Act expands the scope of the Commission's authority to address slamming by all carriers that "submit" or "execute" preferred carrier (PC) changes.[41] We seek comment on whether our current verification rules are adequate in light of this expansion to all carriers. We also seek comment on whether our rules would have consumer protection and pro-competition effects in the local market and whether they can or should be applied to the local market in whole or in part.

12. We propose to incorporate the specific language of Section 258(a) of the Act into Part 64 of our rules to reflect the statutory prohibition of slamming by any telecommunications carrier, not just IXCs as is the case under our current rules.[42] Mirroring the language in Section 258, proposed Section 64.1160(a) would state that no telecommunications carrier shall submit *or* execute a change in a

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[37] 47 U.S.C. § 222(c). In the *CPNI NPRM* the Commission tentatively concluded that Section 222 requirements can be interpreted to require that a telecommunications carrier must obtain authorization from a customer before using that customer's CPNI, which it obtained in providing one traditional telecommunications service (e.g., long distance), to market another traditional telecommunications service (*e.g.*, local exchange). *See CPNI NPRM*, 11 FCC Rcd at 12523-24.

[38] A detailed history of the evolution of our PIC-change verification rules is set forth in our *1995 Report and Order*, 10 FCC Rcd at 9561-63.

[39] *1995 Report and Order*, 10 FCC Rcd at 9564.

[40] *Id.*

[41] We use the term "preferred carrier" or PC to describe the subscriber's properly authorized or primary carrier(s) (a subscriber may have multiple PCs - one for local exchange service and one for long distance service), as contemplated by the Act. Where appropriate, we will continue to use the term "PIC" to describe a subscriber's primary interexchange carrier prior to the 1996 Act.

[42] *See* Appendix C.

subscriber's selection of a provider of telecommunications service[43] except in accordance with the Commission's verification procedures. We propose to increase the scope of Sections 64.1100 and 64.1150 of our rules by expanding them to include all telecommunications carriers. We also propose to modify Section 64.1100 to use the term "subscriber" in place of "customer." This proposed modification is consistent with the use of the term "subscriber" in Section 258.[44] We also propose other modifications to Sections 64.1100 and 64.1150 of our rules for clarification purposes.[45] Section 258 and our proposed rules significantly expand the application of our PIC-change requirements to cover all "telecommunications carriers" that "submit or execute" PC changes on behalf of telecommunications service subscribers.[46] Thus, LECs are also subject to Section 258(a) of the Act if they "*submit or execute*" a change in a subscriber's selection of a preferred carrier.

13. The Act does not define "submitting" and "executing" carriers. Under our current verification procedures, the submitting carrier is the IXC that requests on behalf of a consumer that a PIC change be made, and the executing carrier is the LEC that effects the PIC change. Under our proposed rules, submitting and executing carriers may be IXCs or LECs, or both. Moreover, the same carrier could serve as both submitting and executing carrier for a particular PC change. To ensure that our proposed verification procedures will apply to all carriers involved in PC-change transactions, we tentatively conclude that a submitting carrier is any carrier that requests that a consumer's telecommunications carrier be changed, and that an executing carrier is any carrier that effects such a request. We seek comment on these definitions, and on whether they are sufficiently broad in scope to hold accountable all carriers involved in PC-change transactions.

14. We believe that, with the modifications and clarifications discussed elsewhere in this Further Notice, the verification procedures under our existing rules are sufficient as they pertain to all "submitting" telecommunications carriers under the Act. The application of our verification procedures to "executing" telecommunications carriers is more complex, however. We believe that Section 258 does not require that an executing telecommunications carrier duplicate the PC-change verification efforts of the submitting telecommunications carrier.[47] In fact, requiring independent verification by an executing carrier in all instances could have the effect of doubling the transaction costs associated with a subscriber's

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[43] "Telecommunications service" includes both telephone exchange and telephone toll service.

[44] The term "subscriber" is also appropriate in this context, because the only individual qualified to authorize a preferred carrier change is the telephone line subscriber. *See 1995 Report and Order*, 10 FCC Rcd 9560, 9564 n.16.

[45] *See* Appendix C, proposed § 64.1100(b),(d); § 64.1150(b),(d),(e)(2).

[46] The *1995 Report and Order* adopted rules and procedures for changing a consumer's PIC. The Act expands the scope of those entities and services that may be affected by the Commission's "carrier selection" rules to include a subscriber's selection of any "telephone exchange service or telephone toll service." 47 U.S.C. § 258.

[47] That is, we believe that Section 258 does not impose an independent requirement on executing carriers (*e.g.*, LECs) to verify a PC-change request submitted by another carrier (*e.g.*, an IXC). Because the submitting carrier, not the executing carrier, is guilty of slamming in st instances, we believe requiring that both the submitting and executing carriers verify PC changes w l not likely lessen the number of slamming instances.

selection of a primary carrier. In most cases, the submitting carrier's compliance with our verification rules should facilitate timely and accurate execution of the PC change to the benefit of the subscriber and submitting carrier. We seek comment on this tentative conclusion and invite interested parties to identify and describe specific additional or separate verification procedures, if any, that should apply to telecommunications carriers that "execute" PC changes within the meaning of Section 258. Commenters suggesting additional or separate verification procedures for telecommunications carriers that execute PC changes should address the effects on competition and on consumer protection, if any, of such procedures.[48] In doing so, commenters should bear in mind the different interests and functions of submitting and executing carriers, and should consider that the same telecommunications carrier could be both the submitting and the executing carrier for purposes of Section 258.

15. Commenters should also address whether incumbent LECs should be subject to different requirements and prohibitions because of any advantages that their incumbency gives them compared to carriers that are seeking to enter the local exchange markets.[49] Under the current approach, an incumbent LEC would be responsible for executing PC-change requests for local service from competing carriers, which will result in a loss of business for the incumbent LEC. To avoid losing local customers, the incumbent LEC could potentially delay or refuse to process PC-change requests from local exchange service competitors.[50] A related concern is that a PC change may lead a carrier to engage in conduct that blurs the distinction between its role as executing carrier and its objectives as a marketplace competitor. For example, an incumbent LEC may send to its subscriber who has chosen a new LEC a promotional letter in an attempt to change the subscriber's decision to switch to another carrier.[51] We seek comment on whether such a letter would violate our verification rule prohibiting carriers from combining LOAs with inducements of any kind on the same document,[52] and on whether such a practice would be otherwise inconsistent with the Act's consumer protection and pro-competition goals. We also seek comment on whether LECs serving as both submitting carrier and executing carrier for changes in telecommunications service,[53] whether offering interexchange and local exchange service or just local exchange service, have

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[48] Under Section 258 (a), we could impose separate verification procedures upon "executing" telecommunications carriers, but the statute does not compel us to do so.

[49] Incumbent LECs arguably have an enhanced ability to make unauthorized PC changes on their own behalf without detection because of their established relationship with local customers. For example, by soliciting PC freezes from their local exchange customers, incumbent LECs may be able to erect an entry barrier for carriers seeking to enter the local market. *See* paras. 22-23, *infra*.

[50] On the other hand, heightened scrutiny of PC-change orders by incumbent LECs seeking to avoid *unlawful* PC changes to their detriment may have the positive effect of lessening or eliminating the occurrence of unauthorized PC changes.

[51] Such letters may contain elements of verification (*e.g.*, "we just want to make sure that you meant to change to a new carrier") as well as promotional elements (*e.g.*, "we'd love to keep you as a customer, and we'll give you a free month of service if you stay").

[52] 47 C.F.R.§ 64.1150(c); *see also* 47 C.F.R.§ 64.1150(b) (providing that the LOA must be a separate or an easily separable document).

[53] This might occur where a LEC offers bundled services. Commenters have addressed the similar instance in which LECs may have a conflict of interest between their role as executing carrier and their role as an *affiliate* of a submitting carrier (*e.g.*, IXC). *See* n.103, *infra*.

an enhanced ability or incentive to make unauthorized PC changes on their own behalf without detection, and thus should be limited to verification by an independent, third-party.[54]

Viability of the "Welcome Package" Verification Option

16. As discussed above, Section 64.1100 of the Commission's rules requires IXCs to institute one of four confirmation procedures before submitting to LECs their PIC-change orders generated by telemarketing. The fourth confirmation procedure, set forth in Section 64.1100(d), requires the IXC to send each new customer an information package, including, *inter alia,* a prepaid postcard, which the customer can use to deny, cancel, or confirm the change order. This option is sometimes referred to as the "welcome package" verification option. Section 64.1100(d)(8) provides that the package must contain:

> A clear statement that if the customer does not return the postcard the customer's long distance service will be switched within 14 days after the date the information package was mailed to [name of soliciting carrier].

17. In its petition for reconsideration of our *1995 Report and Order*, NAAG proposed that we revise the negative-option aspect of this provision by eliminating the automatic switching of consumers who do not return a postcard to the IXC within the 14-day period prescribed by the provision.[55] NAAG asserts that such an amendment will bring these provisions into conformity with the Commission's *1995 Report and Order* and new Section 64.1150(f), which prohibits "negative-option" LOAs.[56] Several parties oppose NAAG's petition on this issue, arguing that this verification option is unlike a negative-option LOA in that consumers have already given their oral agreement during a telemarketing call to change their service.[57]

18. A negative-option LOA requires a consumer to take some action to *avoid* a PIC change. Nearly every entity choosing to comment on the matter supported the Commission's prohibition of negative-option LOAs.[58] In adopting the prohibition against negative-option LOAs, we found that such LOAs impose an unreasonable burden on consumers who do not desire to change their PICs.[59] However, as stated above, not all carriers agree with NAAG that the "welcome package" option operates the same as a negative-option LOA. We do not yet have enough information in the record to determine the effect of eliminating this verification option,[60] but we are inclined to agree with NAAG that it could be used in

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[54] While such anticompetitive behavior could be addressed in the context of a Section 208 complaint proceeding, we encourage commenters to discuss the need for additional safeguards in our rules to prevent such occurrences.

[55] NAAG Petition at 16-17.

[56] *Id.* at 17.

[57] *See* para. 63, *infra.*

[58] *See 1995 Report and Order,* 10 FCC Rcd at 9565.

[59] *Id.*

[60] *See* para. 64, *infra.*

the same manner as a negative-option LOA. Accordingly, we tentatively conclude that the "welcome package" verification option should be eliminated, and seek comment on this tentative conclusion.

Application of the Verification Rules to In-Bound Calls

19. We concluded in our *1995 Report and Order* that we should extend our verification procedures to consumer-initiated "in-bound" calls.[61] We remain convinced that it serves the public interest to offer consumers who place calls to carrier sales or marketing centers the same protection under our verification rules as those consumers who are contacted by carriers.[62] Moreover, with the Section 258 extension of slamming restrictions to all telecommunications carriers, and the potential for a single carrier to offer local exchange and interexchange service, it is likely that problems with in-bound calling will be of even greater significance. Without any requirement for verification of in-bound calls, carriers may be motivated to use the call to switch a consumer to other telecommunications services they provide (*i.e.*, local or long distance service).[63] We tentatively conclude that verification of in-bound calls is necessary to deter slamming, and seek further comment on the volume of in-bound calls received by carriers, and the per-consumer costs for verification using the Commission's requirements versus alternative verification techniques.

20. Section 258 applies only if a carrier violates our verification procedures.[64] Commenters who disagree with applying the Commission's verification procedures to in-bound calls should consider the implications under Section 258 of "exempting" in-bound calls from our verification rules. Would such an exemption undermine both the letter and spirit of Section 258? We also encourage commenters to consider whether, without in-bound verification requirements, carriers' contests and sweepstakes advertisements could potentially be used to induce consumers to call the carriers' in-bound marketing centers, and possibly switch the consumer to another carrier, either through deceptive practices or through the use of electronic information now widely available, such as ANI. Would such a practice place an

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61 *1995 Report and Order*, 10 FCC Rcd at 9560. The Commission, on its own motion, stayed its *1995 Report and Order* insofar as it extends the PIC-change verification requirements set forth in Section 64.1100 of the Commission's rules to consumer-initiated calls. Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Order, 11 FCC Rcd 856 (1995) (*In-bound Stay Order*). The stay was imposed before the effective date of the *1995 Report and Order*. The consumer-initiated or in-bound telemarketing provision is the only component of its new slamming rules that the Commission stayed. The stay of this provision of the Order remains in effect.

62 *See* discussion at para. 51, *infra*.

63 *See, e.g.*, Letter from Marilyn Diamond to AT&T (Mar. 29, 1996), forwarded to the Commission by the State of New York Department of Public Service (May 9, 1996) (alleging that AT&T changed the local provider without authorization); Letter from Jeffrey S. Stevens to New York Telephone (Apr. 5, 1996) (alleging that AT&T made an unauthorized local provider change); Letter from Michael Cammer to NYNEX and MCI Telecommunications (May 11, 1996) (alleging that MCI made an unauthorized local provider change).

64 Section 258(a) provides, in pertinent part, that "[n]o telecommunications carrier shall submit or execute a change . . . except in accordance with such *verification procedures* as the Commission shall prescribe." 47 U.S.C. § 258(a) (emphasis added). Section 258(b) provides in pertinent part that "[a]ny telecommunications carrier that *violates the verification procedures* described in subsection (a). . . ." 47 U.S.C. § 258(b) (emphasis added).

unfair burden on consumers to prove that an unauthorized conversion occurred? With in-bound telemarketing, the consumer and the Commission might not have any record of the transaction that resulted in the carrier change;[65] the lack of a record would make it difficult to ascertain the facts involved in any in-bound slamming dispute. We also encourage commenters to consider the case of bundled service offerings. Entities would be able to generate in-bound calls to marketing centers that accept service orders for affiliate carriers, thereby facilitating slamming by carriers that are not directly contacted by the consumer.[66] None of these scenarios is desirable, and commenters are urged to suggest appropriate mechanisms to guard against such abuses. Commenters should provide specific information to justify exemption of in-bound calling from the PIC-change verification requirements.

Verification and Preferred Carrier Freezes

21. We also seek comment on whether our PIC-change verification procedures should be extended to PC-freeze[67] solicitations. Although neither the Act, nor the Commission's rules and orders specifically address carrier PC-freeze solicitation practices,[68] concerns about PC-freeze solicitations have been raised with the Commission.[69] Moreover, MCI filed a Petition for Rule Making on March 18, 1997, requesting that the Commission institute a rule making to regulate the solicitation, by any carrier or its agent, of PIC freezes or other carrier restrictions on a consumer's ability to switch its choice of interexchange (interLATA or intraLATA toll) and local exchange carrier.[70] We have determined that it

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[65] With out-bound calls, the "record" of the transaction would be the LOA or other proof of verification as prescribed in our rules.

[66] For example, XYZ Cable Co. generates an in-bound call and as part of the transaction, the consumer agrees to take long distance service from XYZ Long Distance Co. either because the representative for XYZ Cable slammed the consumer or there was a misunderstanding as to what service the consumer wanted. Even though there are rules to prevent carriers from using CPNI in this manner, *see supra* para. 10 (regarding the restrictions on the use of CPNI to market a different traditional telecommunications service), requiring verification of in-bound calls would offer an extra measure of protection.

[67] *See supra* note 4.

[68] We note, however, that the Common Carrier Bureau Enforcement Division's staff has previously reviewed certain PIC-freeze change practices and found them to be consistent with the Act and the Commission's rules and orders. *See, e.g.*, Staff Interpretive Ruling Regarding Preemptive Effect of Commission's Regulations Governing Changes of Consumers' Primary Interexchange Carriers and the Communications Act of 1934, As Amended, On Particular Enforcement Action Initiated by the California Public Utilities Commission, DA 96-1077 (Jul. 3, 1996); *see also* Letter, Elliot Burg, Esq., Asst. Attorney General, State of Vermont, 11 FCC Rcd 1899 (1995).

[69] *See, e.g.*, Letter from Donald F. Evans, MCI Telecommunications Corporation to John Muleta, FCC (Jul. 31, 1996).

[70] MCI Petition for Rule Making, RM-9085 (filed Mar. 18, 1997). AT&T has indicated that it "strongly supports" MCI's petition to establish regulations governing PC freezes. Letter from Mark C. Rosenblum, AT&T Corp. to Regina M. Keeney, FCC (Apr. 9, 1997). The Commission has established a pleading cycle for comments regarding MCI's petition. *See* Public Notice, DA 97-942 (rel. May 5, 1997).

is appropriate to consider MCI's petition in the instant notice and comment proceeding. We therefore incorporate MCI's petition and all responsive pleadings into the record of this proceeding.[71]

22. PC freezes are designed to offer consumers protection against slamming by preventing carriers from effecting carrier changes on their behalves. They may also, however, have the effect of limiting competition among carriers. Enabling carriers to request PC changes on behalf of consumers that authorize such changes saves consumers time and effort. Once the consumer gives a carrier its authorization to submit a PC change order, the carrier can submit the change order on behalf of the consumer, and the change can be effected without further effort by the consumer. With a PC freeze in place, a carrier cannot submit the request on the consumer's behalf. The consumer must advise the carrier from whom he or she requested the freeze to lift the freeze before a change can be effected. Not all consumers are willing to take this additional, affirmative step, even when they have agreed to take a competing carrier's service. Hence, PC freezes may increase the burden of competing carriers in securing new customers. We seek comment on how best to reconcile the competing strains of providing adequate consumer protection and facilitating competition among carriers.

23. We tentatively conclude that a carrier that mails to a subscriber (a) an explanation of a PC freeze, (b) an explanation of the subscriber's right to request such a freeze for its telecommunications service, and (c) advice on how the subscriber can obtain a PC freeze, would be acting consistent with the goals and policies of the Act and the Commission's rules and orders.[72] In contrast, a carrier that mails to a subscriber a package that includes information and/or promotional materials regarding PC freezes along with a "response form" that the subscriber is asked to sign and return to the carrier to effect a freeze could involve marketing solicitations designed to enhance the competitive position of the incumbent carrier in a manner that may be at odds with the requirements of the Act and the Commission's rules and orders. For example, to the extent that an IXC soliciting a PC freeze is also the subscriber's LEC, the practice could be designed to, or have the effect of, giving the IXC/LEC an unfair advantage in the toll service and local exchange markets. This practice might also foster wide-spread confusion and dissatisfaction among consumers if, *e.g.*: (1) it is unclear from a carrier's solicitation materials whether the PC freeze relates to the consumer's local service, long distance service, or both; (2) the identity of the soliciting carrier is unclear or somehow misrepresented, or (3) the solicitation contains an inaccurate explanation of a consumer's rights to cancel the PC freeze. Another practice that might raise concerns about anticompetitive behavior would be a LEC's imposition of terms and conditions for processing PC-freeze requests of non-affiliated IXCs different from those required of affiliated IXCs.[73]

24. Commenters should address whether we should extend our current PIC-change verification procedures to PC-freeze solicitations, as well as what alternative verification procedures might be applied to PC-freeze solicitations. We encourage commenters to describe any benefits to consumers that might

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[71] *See* Appendix A.

[72] Such a mailing would serve to inform and educate the subscriber without requiring or soliciting a particular action or response that could be used to effect a PC freeze in circumstances in which the subscriber may not have expressly authorized it.

[73] Such a practice by a Bell operating company (BOC) would violate Section 272 of the Act, which provides in part that a BOC "may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities and information, or in the establishment of standards . . . ." 47 U.S.C. § 272(c)(1).

result from either such action. In particular, we seek comment on what practices would promote both competition and consumer protection. For example, commenters should address whether, when a consumer that has "frozen" his or her IXC selection switches LECs, the consumer must request another PC freeze, or whether the new LEC must automatically establish the same PC freeze on the consumer's behalf. We also seek comment on what factors we should consider in assessing the lawfulness of a particular PC-freeze solicitation practice in a Section 208 complaint proceeding.[74] We tentatively conclude that such factors may include: (1) the degree of certainty that the PC freeze was obtained through lawful means and the extent to which circumstances suggest the existence of deception or fraud; (2) whether the solicitation practice at issue is unreasonable, unreasonably discriminatory, or anticompetitive in purpose or effect; and (3) the impact of the solicitation practice on consumers, including whether the consumer is fully and accurately informed of the nature of the solicitation and the effect of a PC freeze, is clearly given the option of selecting or declining the PC freeze, and is informed of his or her right to cancel the PC freeze and select a different PC at any time.

B. Section 258(b) (Liability)

Liability of Subscribers to Carriers

25. When a subscriber pays charges assessed by an unauthorized carrier, Section 258(b) of the Act makes it clear that the unauthorized carrier is not entitled to keep such revenue gained through slamming.[75] The Act does not, however, address whether subscribers must pay any unpaid charges assessed by an unauthorized carrier to the properly authorized[76] carrier, or whether charges collected from the unauthorized carrier should be returned to the subscriber who has been slammed.

26. In the Notice of Proposed Rulemaking preceding our *1995 Report and Order* we sought comment on whether any adjustments to long distance charges should be made for consumers who are the victims of unauthorized PIC changes. Specifically, we asked for comment on whether consumers should be liable for: (a) the total billed amount from the unauthorized IXC; (b) the amount the consumer would have paid if the PIC had never been changed; or (c) nothing at all.[77] We concluded in the *1995 Report and Order* that "the equities tend to favor the [remedy]" of option (b).[78] NAAG, in its petition for reconsideration of our *1995 Report and Order*, urges the Commission to absolve slammed consumers of all liability for the toll charges assessed by unauthorized IXCs.[79] Citing the Commission's own

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[74] 47 U.S.C.§ 208; *see also* the Commission's rules governing Section 208 complaint proceedings, 47 C.F.R. §§ 1.720-1.735.

[75] 47 U.S.C. § 258(b).

[76] The terms "properly authorized" and "preferred" may be used interchangeably throughout this rule making.

[77] *NPRM*, 9 FCC Rcd at 6888.

[78] *1995 Report and Order*, 10 FCC Rcd at 9579 (concluding that "the slammed consumer does receive a service, even though the service is being provided by an unauthorized entity.").

[79] NAAG Petition at 5.

reservations about the efficacy of its chosen "remedy" to the consumer liability problem,[80] NAAG argues that "to reward the wrongdoer by allowing it to receive any benefit from its wrongful actions is contrary to long established equitable principles and would encourage, rather than deter further slamming."[81] Section 258(b) of the Act, however, appears to mitigate those concerns by ensuring that the unauthorized carrier is liable to the properly authorized carrier for all charges it collects from the subscriber for service rendered by that unauthorized carrier.

27. Although the 1996 Act removes the economic incentive for carriers to slam, we believe that additional measures may be appropriate in light of the consumer protection goals and policies of the Act and the Commission's rules. Under Section 258(b), the liability between properly authorized and unauthorized carriers exists only to the extent that the unauthorized carrier actually collects charges from a slammed subscriber.[82] Therefore, we seek comment on whether slammed consumers should have the option of refusing to pay charges assessed by an unauthorized carrier. We recognize that if subscribers are absolved of all liability for charges assessed after being slammed, as NAAG proposes, the properly authorized carrier would be deprived of foregone revenue.[83] Thus, we seek comment on the impact to properly authorized carriers that would result if slammed subscribers are absolved of liability for unpaid charges. We recognize that, by establishing a rule that absolves slammed subscribers of liability for charges assessed by an unauthorized carrier, we may create an incentive for subscribers to delay reporting that they have been slammed. We also recognize the potential for subscribers to fraudulently claim that they have been slammed to avoid payment for telecommunications service that they may both have requested and received. Therefore, we also invite comment on whether we should limit the time during which a subscriber would not be liable for charges, and seek recommendations regarding what that time should be.[84] Although we decline at this time to grant NAAG's proposal that the Commission absolve slammed consumers of all liability for toll charges assessed by unauthorized IXCs,[85] we seek comment on the advantages and disadvantages of absolving subscribers of liability for unpaid charges. We also urge commenters to consider the desirability of NAAG's proposal in the broader context of both local exchange and interexchange service.

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[80] *Id.* (citing *1995 Report and Order*, 10 FCC Rcd at 9579).

[81] NAAG Petition at 5.

[82] To the extent that a subscriber does in fact pay the charges to the unauthorized carrier, the liability of the unauthorized carrier to the properly authorized carrier, and to the subscriber, is discussed below.

[83] The legislative history of Section 258 supports the view that carriers violating our verification procedures "must reimburse the [properly authorized] carrier for forgone revenues." Joint Explanatory Statement at 136.

[84] For example, the New York Public Service Commission has proposed a rule providing that carriers violating their slamming rules "shall refund to the end user the entire amount of such end user's telephone charges attributable to intrastate telephone service from the carrier for *up to four months* of such unauthorized service." Unauthorized Switching of Telephone Customers From One Telephone Carrier to Another Through the Practice Known as "Slamming," Notice Soliciting Comments, Case 95-C-0806 (Dec. 13, 1996) (attaching Proposed New York Slamming Rules) (emphasis added).

[85] *See* para. 65, *infra*.

Liability of Unauthorized Carriers to Properly Authorized Carriers

28. We propose to amend our rules to provide in Section 64.1160(b) that "[a]ny telecommunications carrier that violates [the Commission's verification procedures] and that collects charges for telecommunications service from a subscriber shall be liable to the subscriber's properly authorized carrier in an amount equal to all charges paid by such subscriber after such violation."[86] Our proposal mirrors Section 258(b) of the Act by requiring that a carrier in violation of our verification procedures remit to the properly authorized carrier all charges paid from the time the slam occurred.[87] We seek comment on this proposed rule and on whether the unauthorized carrier should also be liable to the properly authorized carrier for expenses incurred to collect such charges.

Liability of Carriers to Subscribers

29. While Section 258(b) addresses the liability of the unauthorized carrier to the properly authorized carrier, it does not specifically address the liability of either carrier to the subscriber. We believe that a slammed subscriber should receive prompt and full reparation for harm suffered as a consequence of unauthorized PC changes. The legislative history of Section 258 is in accord with this view, stating that "the Commission's rules should also provide that consumers are made whole."[88] Thus, we seek comment on the duties and obligations of both the unauthorized carrier and the properly authorized carrier with regard to making slammed subscribers whole, and on what steps should be taken to "make whole" the subscriber victimized by an unauthorized PC change.[89] Commenters should address specifically whether, in the event that a subscriber pays charges assessed by an unauthorized carrier (perhaps because the subscriber is unaware that he or she was slammed), a properly authorized carrier collecting charges paid by the subscriber to the unauthorized carrier, must then reimburse the slammed subscriber.

30. The legislative history of Section 258 supports the view that restoration of premiums that subscribers would have earned if they had not been slammed, such as travel bonuses, are part of making subscribers whole.[90] Premiums are additional products or services offered to consumers for subscribing to a carrier's telecommunications service. While premiums may include products and services not related

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[86] *See* Appendix C.

[87] Of course, a carrier accused of slamming may demonstrate to the properly authorized carrier that the PC change was in fact authorized by providing an LOA signed by the subscriber that complies with Section 64.1150 or other reliable evidence that the PC-change order was confirmed in accordance with the Commission's verification procedures.

[88] Joint Explanatory Statement at 136. However, neither the language in Section 258(b), nor the legislative history specifically addresses carrier-to-consumer liability.

[89] For example, we believe that one aspect of making the consumer whole is restoring his or her service to that of the preferred carrier upon notification that an unauthorized PC change has occurred.

[90] Congress stated that "the Commission's rules should require that carriers guilty of 'slamming' should be liable for premiums, including travel bonuses, that would otherwise have been earned by telephone subscribers but were not earned due to the violation of the Commission's rules. . . ." Joint Explanatory Statement at 136.

to telecommunications service, they may also include telecommunications service-related benefits, such as volume discounts or free service minutes. Thus, we seek comment on what types of products and services offered by telecommunications carriers should be restored to slammed subscribers. In light of Congress' apparent intent to hold slamming carriers liable for premiums, we propose that the unauthorized carrier remit to the properly authorized carrier an amount equal to the value of such premiums, as reasonably determined by the properly authorized carrier.[91] Under our proposal, upon receiving the value of such premiums from the unauthorized carrier, the properly authorized carrier must then provide or restore to the subscriber any premiums to which the subscriber would have been entitled if the subscriber had not been slammed.[92] We believe that placing responsibility on the preferred carrier to make its subscriber whole by restoring lost premiums (after receiving the value of such premiums from the unauthorized carrier) would fairly and reasonably balance the interests of all parties involved and is the most administratively feasible.[93] We seek comment on our proposed rule on this aspect of our "make whole" approach. We also seek comment on whether carriers should be required to restore premiums to subscribers who have not paid charges assessed by an unauthorized carrier. Interested parties are encouraged to identify, in detail, any alternative proposals that would accomplish our goal of ensuring that subscribers victimized by slamming practices receive full reparations for harm suffered as a consequence of such practices.[94]

Dispute Resolution

31. We also propose to require that, in the event of disputes between carriers under these liability provisions, the carriers involved in such disputes must pursue private settlement negotiations regarding the transfer of charges and the value of lost premiums from the unauthorized carrier to the properly authorized carrier prior to petitioning the Commission to make a determination.[95] The statutory mandate is clear that the unauthorized carrier must remit to the authorized carrier those "charges paid by [a] subscriber after [a] violation" of our PC-change rules. Because the charges recoverable from the unauthorized carrier are so defined, we tentatively conclude that private negotiations are appropriate in this situation. It would appear that any dispute regarding, for example, the method or timing of payment between carriers, could best be resolved by the carriers involved through negotiations. Under this approach, we would entertain a request for enforcement of proposed Section 64.1170(a) only after the parties have certified that they have undertaken private negotiations and that, following these steps,

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[91] *See* Appendix C, proposed § 64.1170(b).

[92] *See* Appendix C, proposed § 64.1170(c).

[93] In other words, the properly authorized carrier is in the best position to take prompt and effective action to make sure that a consumer is "made whole" because that carrier and the consumer will have a continuing carrier-customer relationship.

[94] For example, commenters should consider whether the properly authorized carrier should be required to give the consumer a "make whole" equivalent premium or dollar amount where the properly authorized carrier cannot restore a particular premium.

[95] *See* Appendix C, proposed § 64.1170(d).

unresolved issues remained.[96] We propose to establish this prerequisite to requesting enforcement action pursuant to our general discretion under Section 258 to adopt procedures associated with PC changes. We seek comment on these proposals and our tentative conclusions underlying them. We also seek comment on procedures for implementing these requirements.

Liability Between Carriers

32. Section 258 requires both the submitting and executing telecommunications carriers to ensure that a PC change comports with procedures established by the Commission to protect consumers and promote fair competition. Hence, to the extent that a submission or execution fails to comport with established procedures, the Act contemplates that either or both telecommunications carriers could be liable for an unauthorized change in a subscriber's telecommunications service. Therefore, the verification duties and obligations of the submitting and executing carriers should be delineated in order to avoid or minimize disputes over the source or cause of unauthorized PC changes, or over liability for such PC changes. We also believe it is appropriate to establish a mechanism that can be used to determine reasonably the liability between submitting and executing carriers if the facts suggest some wrongdoing or malfeasance on the part of both carriers involved in a PC-change transaction. The Commission would address liability between submitting and executing carriers only if the carriers are unable to resolve the dispute between themselves.[97]

33. In deciding the appropriate liability test to apply when reviewing unauthorized PC-change complaints by consumers, we considered tests traditionally applied in the tort liability context. The "but-for" test, generally applicable to determine causation in fact, asks whether a plaintiff would not have suffered injury "but for" the action of the defendant.[98] The "substantial factor" test, generally applicable to determine legal or proximate causation,[99] asks whether the defendant's actions were a substantial factor in bringing about the plaintiff's harm.

34. Because we are primarily concerned with establishing the actual liability of each carrier, we tentatively conclude that we should apply a "but for" test to determine the liability of submitting and executing carriers. The "but for" approach to determining liability to the subscriber that we propose would operate as follows: (1) where the submitting carrier submits a PC-change request that fails to comply with the requirements of Section 64.1160 and the executing carrier performs the change in accordance with the submission, the submitting carrier is liable; (2) where the submitting carrier submits a change request that conforms with the requirements of Section 64.1160 and the executing carrier fails to execute the change in conformance with the submission, the executing carrier is liable; and (3) finally, where the submitting carrier submits a PC-change request that fails to comply with the requirements of Section 64.1160 and

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[96] By requiring private negotiations, we do not intend to mandate formal dispute resolution procedures such as arbitration. Carriers that attempt in good faith to resolve any disputes and certify that they have done so would be in compliance with this requirement.

[97] *See* Appendix C, proposed § 64.1160(a)(3); *see also supra* note 96.

[98] *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 240, 109 S.Ct. 1775, 1785 (1989).

[99] Legal, or proximate cause is distinguishable from cause in fact. To be a legal cause, an act must not only be an actual cause (*i.e.*, cause in fact), it must also be a substantial factor in bringing about the plaintiff's injury. *See generally* Restatement (Second) of Torts § 431 cmt. a (1965).

the executing carrier fails to perform the change in accordance with the submission, the submitting carrier is liable.[100]

35. Although we believe that executing carriers are not subject to independent verification requirements,[101] the "but for" test recognizes that executing carriers may, in some instances, be liable for unauthorized carrier changes. For example, liability may attach to the executing carrier under Section 258 where the executing carrier changes the PC selection of the wrong subscriber, converts the subscriber to the wrong carrier, or fails to perform the PC change in a timely manner, thus depriving the subscriber and the authorized carrier of benefits. Hence, our use of the "but for" test would not preclude us from examining the actions of the executing carrier where the facts suggest wrongdoing or malfeasance on the part of the executing carrier. We seek comment on alternative mechanisms for executing PC changes, such as the use of an independent third party to execute PC changes neutrally, that might reduce PC-change disputes.[102] Commenters should address how such mechanisms would operate, the costs of implementation and operation, and how these costs should be funded. Commenters should also describe the benefits to consumers, if any, of any proposed alternative(s).

C. Evidentiary Standard Related to Lawfulness of a Resale Carrier's Change in Underlying Network Provider

36. The Telecommunications Resellers Association (TRA) filed a Petition for Clarification on December 11, 1995 that requests clarification of the circumstances under which resale carriers must notify their subscribers of a change in their underlying network provider.[103] We have determined that it is appropriate to consider TRA's petition, which asks us to issue a generally applicable clarification related

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[100] *See* Appendix C, proposed §§ 64.1160(a)(1)-(3). As a practical matter, a PC-change request submission should always precede a PC-change execution; thus, the liability of an executing carrier for unauthorized PC changes would only be addressed after the actions of the submitting carrier are considered.

[101] *See supra* note 47.

[102] Some carriers are concerned that as the competitive marketplace changes, LECs may have a conflict of interest between their role as LEC and their role as an affiliate of an interexchange competitor. *See, e.g.*, Letter from Bruce K. Cox, AT&T to John Muleta, FCC, CC Dkt No. 94-129 (Sept. 27, 1996) (*ex parte*). AT&T suggests that "to avoid the inherent conflict of interest between competing carriers, serious consideration should be given to establishing procedures under which neutral third parties administer PIC protection." *Id.*

[103] *See generally* TRA Petition for Clarification of File No. ENF-94-05 (filed Dec. 11, 1995) (*TRA Petition*). In an effort to eliminate consumer confusion about the facilities-based IXC with whom reselling IXCs have contracted to obtain service in resale situations, we mandated in our *LOA Order* that only the name of the "rate-setting" IXC may lawfully appear on an LOA. *LOA Order*, 10 FCC Rcd at 9575. Thus, if an end-user executes and delivers an LOA designating a resale carrier as its PIC, the name of the resale carrier's underlying network provider must not appear on the LOA if the resale carrier sets the end-user's rates. The scope of TRA's Petition and our discussion below do not extend to modifying or clarifying this requirement.

to our PC-change verification rules and orders, in the instant notice and comment proceeding.[104] We are, therefore, incorporating TRA's petition, and all responsive pleadings, into the record of this proceeding.[105]

37. TRA filed its petition in response to a 1995 Common Carrier Bureau (Bureau) ruling that a resale carrier violated Section 201(b) of the Act[106] by unjustly and unreasonably changing its underlying network provider.[107] The Bureau's ruling was based on the evidence presented in an adjudicatory proceeding.[108] Based on the record, the Bureau found that: (1) a change in the resale carrier's underlying network was a material fact *vis-a-vis* the reseller's subscribers;[109] and (2) the resale carrier did not notify its subscribers of its network change despite having the means and opportunity to do so.[110]

38. TRA proposes that, instead of determining when subscriber notification is required on a case-by-case basis, we establish a "bright-line" test under which subscriber notification would be required only if a resale carrier either: (1) identified its underlying network provider to its subscribers and committed to those subscribers in writing that it would not switch networks; or (2) identified its network provider on a bill or other correspondence to its subscribers within six months prior to the change in network provider. If neither of these two circumstances exists, then under TRA's proposal, a resale carrier could lawfully change its underlying network provider without notifying its subscribers. TRA states that its "bright-line" test would offer the consumer safeguards now provided by the current case-by-case approach, while minimizing the regulatory burden on small to mid-sized carriers and the adverse impact on competition.[111] TRA also states that establishing a bright-line test would enhance competition by

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[104] TRA states that it has no objection to the initiation of a rule making proceeding to define in more detail those circumstances in which a resale carrier's failure to notify end-users of a change in network provider would violate Section 201(b) of the Act. *See* TRA Reply at 6-7.

[105] *See* Appendix A.

[106] 47 U.S.C.§ 201(b). Section 201(b) provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate] communication service shall be just and reasonable . . . ." *Id.*

[107] *See* WATS International Corporation v. Group Long Distance (USA), Inc., Memorandum Opinion and Order, 11 FCC Rcd 3720 (Com. Car. Bur. 1995) (*Bureau Order*), *app. for rev. denied,* Memorandum Opinion and Order, FCC 97-18 (rel. Feb. 4, 1997).

[108] The *Bureau Order* responded to a request for declaratory ruling, filed by the parties to a pending U.S. District Court proceeding, as to whether any of the defendants thereto had violated the Communications Act as the plaintiff alleged. *Id.*

[109] The Bureau found that the network change was a material fact because, among other things, marketing material had induced end-users to subscribe to the resale carrier with the understanding that their traffic would be carried on a particular facilities-based IXC's network. *See Bureau Order*, 11 FCC Rcd at 3729.

[110] The Bureau noted the resale carrier's apparently deliberate omission of this material fact in a letter sent to each end-user customer around the same date as its network change. *See id.*

[111] TRA Petition at 5-6 (citing *PIC Verification Order*, 7 FCC Rcd at 1045). Specifically, TRA states that its proposal would provide resale carriers needed certainty by delineating the circumstances under which a change in their underlying network provider would be considered a material fact. According to TRA, this

providing clear guidance as to the circumstances that make the identity of the underlying network provider a material fact. This guidance is particularly needed, according to TRA, by those resale carriers that emphasize their independent status and "brand" identity as full-fledged carriers in their marketing and promotional material.[112] TRA also notes that resale carriers are prohibited under the terms of some tariffs, or contracts with facilities-based carriers, from disclosing the facilities-based carrier's identity to their customers.

39. TRA asks that we delineate all of the circumstances under which we would consider a network change to be a material fact. While we agree with TRA that establishing a "bright-line" test could enhance competition by providing resale carriers with more certainty "before-the-fact" than is possible under a case-by-case approach, we are not convinced that "materiality" is the proper standard for such a test. We tentatively conclude that any test established to determine when a resale carrier must disclose to its subscribers a change in its underlying carrier should be based on the subscribers' reliance on statements by the resale carrier that it either (1) would provide service to its subscribers using a particular underlying carrier, or (2) would not change its underlying carrier (with or without notifying its subscribers).[113]

40. In view of the foregoing, we tentatively conclude that establishing a bright-line test to determine whether a consumer has relied on a resale carrier's identification of a particular underlying carrier would best serve the public interest by providing both certainty for carriers and protection to consumers from misleading or deceptive practices by carriers. We seek comment on what criteria would make possible substantially all of the benefits that TRA refers to in its petition, but without diminishing the consumer safeguards now provided by the case-by-case approach. Commenters should consider whether any test established should provide for a presumption (conclusive, rebuttable or otherwise) of reliance where a resale carrier publicly commits not to change its underlying network provider, *e.g.*, in advertisements, promotions, or telemarketing. Commenters should also consider whether reliance should be presumed where the resale carrier has identified its network provider in correspondence to its customers within six months prior to a change, or whether reliance should always be presumed, regardless of the timing of the customer correspondence.

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clarification is needed because the unpredictability of the case-by-case approach essentially requires resale carriers either to (1) notify their customers each time they change network provider, or (2) bear the risk that the change might be found unlawful after-the-fact. TRA Petition at 6-8 (adding that undue customer notification can also lead to customer confusion where none previously existed).

[112] TRA Petition at 6-7. TRA states that as the long-distance industry has matured, "branding" and name identification have become an increasingly important part of a successful long-term business strategy. Customer notification can hinder this competitive strategy because, according to TRA, it sends the message that the resale carrier is not the "real" carrier and instead reinforces the brand recognition of the underlying facilities-based carrier. *Id.* at 7.

[113] For example, an obvious case in which a reselling carrier must inform its subscribers of the identity of the underlying network provider would be if the resale carrier has expressly agreed, in a legally binding instrument, to carry the customer's traffic over a particular network.

IV. MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF *1995 REPORT AND ORDER*

41. The consumer protection mechanisms we adopted in our *1995 Report and Order* were designed to curb what we found to be widespread instances of slamming and associated deceptive or misleading marketing practices by many long distance carriers.[114] Specifically, we: (1) prescribed the general form and content of LOAs used by IXCs to obtain subscribers' permission to change their designated PIC; (2) prohibited the use of "negative-option" LOAs that require some affirmative action by a consumer to prevent a PIC change; (3) required LOAs to contain the appropriate language translations if they employ more than one language; and (4) extended the PIC-change verification requirements for PIC-change requests generated through telemarketing sales[115] to consumer-initiated "in-bound" calls to an IXC.[116]

42. Six parties filed petitions for reconsideration of the *1995 Report and Order*.[117] Allnet seeks clarification or, in the alternative, reconsideration of the language in Section 64.1150(e)(4) to reflect the terms "interLATA" and "intraLATA" instead of "interstate" and "intrastate," respectively.[118] AT&T, MCI and Sprint seek reconsideration and reversal of the Commission's decision to extend PIC-change verification requirements to customer-initiated calling.[119] MCI also seeks reconsideration of the

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[114] The *1995 Report and Order* stated that the Commission took further action against slamming, in part, because of the tens of thousands of additional complaints received by LECs and state regulatory bodies. *1995 Report and Order*, 10 FCC Rcd at 9560.

[115] Specifically, Section 64.1100 requires IXCs to institute one of the following four confirmation procedures before submitting to a LEC PIC-change orders generated by telemarketing: (1) obtain the consumer's written authorization; (2) obtain the consumer's electronic authorization by use of an 800 number; (3) have the consumer's oral authorization verified by an independent third party; or (4) send an information package, including a prepaid, returnable postcard, within three days of the consumer's request for a PIC change, and wait 14 days before submitting the consumer's order to the LEC, so that the consumer has sufficient time to return the postcard denying, cancelling, or confirming the change order. 47 C.F.R. § 64.1100.

[116] The Commission has stayed this portion of its verification requirements. *See supra* note 61.

[117] Allnet, AT&T, Frontier, MCI, NAAG, and Sprint filed petitions for reconsideration.

[118] Allnet maintains that 47 C.F.R. 64.1150(e)(4) should read as follows:

> (4) That the subscriber understands that only one interexchange carrier may be designated as the subscriber's interLATA primary interexchange carrier for any one telephone number. To the extent that a jurisdiction allows the selection of additional primary interexchange carriers (e.g., for intraLATA or international calling), the letter of agency must contain separate statements regarding those choices. Any carrier designated as a primary interexchange carrier must be the carrier directly setting the rates for the subscriber. One interexchange carrier can be both a subscriber's interLATA primary interexchange carrier and a subscriber's intraLATA primary interexchange carrier.

Allnet Petition at 1.

[119] AT&T Petition at 1; MCI Petition at 2; Sprint Petition at 1.

Commission's decision to permit the use of LOAs that double as checks.[120] Frontier seeks reconsideration of the Commission's LOA rules, and maintains that the rules should not apply to consumers who have executed written contracts to obtain an IXC's services.[121] Finally, NAAG seeks reconsideration of several aspects of the Order. Specifically, NAAG urges the Commission: (1) to eliminate, as a general rule, any liability for consumers if the switching IXC cannot document that the consumer authorized the switch in accordance with the law; (2) to modify Section 64.1150 to require that: (a) LOAs be on a document separate from any promotional material, not just separable by a perforation; (b) combined check/LOAs be prohibited, unless additional safeguards are required; (c) if an LOA is provided in connection with any promotion, all or part of which is in a language other than English, the LOA must also be provided in that other language; and (d) any promotion in which any inducements to switch long distance service are in a language other than English, must contain a full explanation and make all disclosures in each language used to make the inducements; and (3) to modify Section 64.1100(d)(8) to eliminate the negative option in accordance with paragraph 11 of the *1995 Report and Order* and Section 64.1150(f).[122]

43. Because these petitions seek clarification or reconsideration of the *1995 Report and Order*, we address them in the context of our current rules. Hence, the modifications adopted herein apply only to interexchange service.[123] We nevertheless also consider these petitions in the context of the Section 258 extension of our slamming restrictions to all telecommunications carriers, and, as appropriate, seek comment in the Further Notice portion of this order. With the anticipated increase in local competition, the consumer protection and competitive goals and policies underlying the *1995 Report and Order* will be equally important in both local and long distance markets. As such, our analyses take into account whether the rules will be practical and effective in local as well as long distance markets.

A. Application of Verification Rules to In-Bound Calls

44. In the *1995 Report and Order*, we extended our verification procedures for PIC- change requests generated through telemarketing sales to consumer-initiated, in-bound calls to an IXC.[124] We found that consumers, in response to advertisements or other promotional materials, frequently call IXC telemarketing centers to request general information about the IXC or in response to the IXC's media advertisement. In many cases, consumers placing calls to IXCs do not intend to initiate a PIC change and may be susceptible to the same types of deceptive and misleading marketing practices associated with out-bound telemarketing calls. Our decision to extend the PIC-change verification procedures to PIC-change requests generated by consumer initiated in-bound calls was driven by our desire to ensure that these consumers were afforded the same protection from deceptive and misleading marketing practices

[120] MCI Petition at 10.

[121] Frontier Petition at 1.

[122] NAAG Petition at 2.

[123] Modifications to extend the slamming rules to local exchange service are proposed in the Further Notice portion of this order.

[124] *See supra* note 61 regarding our stay of the PIC-change verification requirements set forth in Section 64.1100 for consumer-initiated calls.